

The Retailer-Contractor Sales Tax Dilemma



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Background

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State law interpretation lets Lowe's give shoppers tax break



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RALEIGH, N.C. — Foggy state tax laws have created a dispute among home improvement stores and could be costing North Carolina millions of dollars in revenue.

Mooresville-based Lowe's Cos. doesn't charge sales tax on items like windows, carpeting, tile, cabinets, counter tops and appliances that store contractors install in customers' homes. When customers buy the goods at Lowe's for a do-it-yourself project, they have to pay the 6.75 percent state sales tax.

Lowe's apparently stands alone in giving customers the tax break. The company's main competitor, Home Depot Inc., and other home improvement stores charge sales tax on

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Sales Tax vs. Use Tax

- **Sales tax** – Imposed on sales price of tangible personal property and certain services sold at retail; collected by the retailer but paid by the consumer
- **Use tax** – Imposed on purchase price of tangible personal property that is used, consumed, or stored in this State.
- Same rate; mutually exclusive



Retailer vs. Performance Contractor



- Makes retail sales of TPP, i.e. sales that are not for resale
- Customer is end user and pays sales tax



- Converts TPP into real property
- End user; pays tax on materials

Basic Principles



- Tax is owed on the sale of these items.
- Contractors are the consumers of the tangible personal property they use in fulfilling performance contracts and are liable for payment of the tax.
- Both contractors and retailers may make retail sales and/or perform contracts.
- A “retailer-contractor” is liable for remitting tax on the sales price of TPP sold at retail and tax on the purchase price of TPP used in a performance contract.
- Installed sales of freestanding appliances, like refrigerators & washer/dryers, are retail sales.
- This is not about the taxation of *installation services*.

So *what* is the issue?



- When is a “retailer-contractor” engaged in a performance contract and, therefore, responsible for paying use tax rather than collecting sales tax?
 - When tangible personal property is permanently affixed to real property?
 - When the property is manufactured on-site?
 - When the property is custom versus pre-fabricated?
 - When the sale isn't for a specific amount but sufficient to accomplish the job?

Common Threads Elsewhere



- Charges for improvements to real estate are not subject to sales tax.
- A contractor who incorporates TPP into realty is the consumer, or end user, and must pay sales or use tax on materials.
- Whether an item of TPP that is installed or affixed to real property becomes part of the real property depends on the facts and circumstances:
 - Intent of purchaser; primary purpose of transaction
 - Expectation that item will stay with property
 - Method of attachment; amount of damage upon removal

Why is this an issue?



- Emergence of new business model
- Murky NC laws
- Inconsistent laws among states



What do the statutes say?



- “A privilege tax is imposed on a **retailer** at the following percentage rates...The general rate of tax applies to the sales price of each item...of tangible personal property that is **sold** at retail...”
 - **Retailer** – A person engaged in the business of...delivering, erecting, installing, or applying tangible personal property for use in this State, *regardless of whether the property is permanently affixed to real property* or other tangible property.
 - **Sale** – The *transfer for consideration of title*, license to use, or consume, or possession of tangible personal property...

How does DOR interpret the law?



Retail Sale + Installation

- Retailer engaged in two separate transactions – sale of specifically itemized materials plus installation.
- Tenor of agreement is for purchase of property; installation a mere convenience
- Customer is end user and should pay sales tax.

Performance Contract

- Contractor controls means, method, and manner
- Does not provide for sale of specific items or quantities of tangible personal property
- Title does not transfer until property is installed at which point it is no longer TPP but rather real property improvement.
- Contractor is end user and should remit use tax.

Why should you care?



- **Clarity** ≠ There are different tax consequences for similar transactions.
- **Consistency** ≠ DOR and contractors have to make determination on case-by-case basis whether a transaction is a retail sale plus installation or a performance contract
- **Fairness** ≠ Different interpretations lead to uneven playing field among businesses engaged in similar activity
- **Fiscal implications** ≠ May be affecting State revenues contrary to legislative intent

Tax Implications



• Wholesale Price of <u>Dishwasher</u>	\$200
• Retail price of dishwasher + installation	\$500
• Use tax on wholesale price	<u>\$13.50</u>
• Total	\$513.50

• Dishwasher	\$400
• Installation*	<u>\$100</u>
• Subtotal	\$500
• Sales Tax	<u>\$27.00</u>
• Total	\$527.00

*Installation charges are exempt if separately stated.

Other Southeastern States



- **SC** – A construction contractor is the user or consumer of everything he buys and those purchases are retail purchases subject to South Carolina sales or use tax. A “construction contractor” is a person or business making repairs, alterations, or additions to real property.
- **GA** – Person who contracts to furnish TPP and perform services in constructing, altering, repairing, or improving real property is deemed the consumer and shall pay tax at time of purchase. Regs do not identify activities that constitute improvement of real property.
- **TN** – Tax consequences of installing TPP differ depending on whether the property remains TPP following installation or becomes part of realty.
- **VA** – TPP incorporated into real property which loses its identity as TPP is deemed TPP used or consumed. Any person selling fences, venetian blinds, window shades, awnings, storm windows and doors, locks and locking devices, floor coverings, cabinets, countertops, kitchen equipment, window A/C units, is deemed a retailer, whether he sells to and installs such items for contractors or customers and whether or not the retailer fabricates the items.

Policy Options



- Extend sales tax to performance contracts for real property improvements
- Clarify what constitutes a real property improvement vs. a retail sale of TPP plus installation
- Clarify law with respect to specific types of transactions that are most common or problematic – cabinets, countertops, flooring, roofing
- Adopt specific requirements for certain types of retailers or contractors

The End



QUESTIONS?